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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

SUNEDISON, INC., et al.,	Main Case No.
Debtors.	16-10992-smb

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

April 26, 2018
10:23 AM

B E F O R E:
HON. STUART M. BERNSTEIN
U.S. BANKRUPTCY JUDGE

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Motion for Order Establishing Procedures Governing Adversary
Proceedings Pursuant to Sections 502, 547, 548, and 550 of the
Bankruptcy Code

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1 P R O C E E D I N G S

2 THE COURT: SunEdison.

3 MR. HURST: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. HURST: David Hurst from Cole Schotz on behalf of
6 the SunEdison Litigation Trust. Your Honor, with me in the
7 courtroom today are my colleagues, Dan Geoghan, and Myles
8 MacDonald.

9 We only have one matter on the agenda for the Court
10 today. It's the motion for approval of procedures governing
11 avoidance actions filed by the trust.

12 Your Honor, what I would suggest is that I give you
13 just a little bit of background so you get a context.

14 THE COURT: Go ahead.

15 MR. HURST: And once I have done that, I'll turn it
16 over to Mr. Geoghan, who will run through the procedures, the
17 objections that were filed, and the resolutions for the most
18 part.

19 Your Honor, we sent out about 650 demand letters in
20 this case, and we did it for a variety of reasons. One thing
21 we wanted to knock out the little claims. We wanted to firm up
22 service addresses --

23 THE COURT: Did you have a cutoff for claims that you
24 would bring suit on?

25 MR. HURST: Sure, Your Honor. Yeah, that's part of

1 what I was going to get to, but yeah, absolutely, 20,000
2 dollars was the cutoff.

3 THE COURT: Because I thought I saw that somebody
4 said -- I think it was one of the California prisons that there
5 was a claim that was 10,000.

6 MR. HURST: Yeah, real little, right? Yeah, so what
7 happened there, they received a demand letter, and then we
8 served everyone that got a demand letter with the motion. So
9 they anticipated that we were going to file a complaint and we
10 didn't. So --

11 THE COURT: Okay.

12 MR. HURST: -- 20,000 was the bottom line, and that's
13 why we sent out the demand letters, to knock out those little
14 complaints or the little claims. We wanted to firm up the
15 service addresses, and we wanted to identify defendants that
16 had a complete defense. We did our best. We looked through
17 the docket. This was a complicated case. A lot went on and we
18 knew we probably didn't do a perfect job. So the demand
19 letters help us to flush that out.

20 Of that group of 650, Your Honor, we ended up filing
21 about 370 complaints, so we really did whittle down that group
22 significantly. Late in the process, I would say about a week
23 before we filed the file complaint, and the deadline was last
24 Friday, the 20th, we discovered a group of defendants that we
25 had not previously identified, and that's because -- I think

1 you are very familiar with the case obviously, the accounting
2 data in this case wasn't great. I thought it was kind of a
3 mess. And so we're working with it and we're doing our best,
4 and we have Alvarez & Marsal working with us to help us extract
5 the information we need, but it's challenging, and so we did
6 discover defendants late in the game, and we discovered a lot
7 of additional transfers late in the game and we did our best to
8 get them into complaints and get them on file.

9 But we did identify this group of 110 defendants late
10 in the game, and we filed complaints with respect to them as
11 well. So the total is about 370 from the demand letter group,
12 plus 110 gets us up to 480, and that's where we stood last
13 Friday when we filed the final complaint, thankfully. I
14 appreciated the deadline actually occurred because we probably
15 could have kept going as more and more information came in.

16 THE COURT: So you have how many complaints?

17 MR. HURST: Approximately 480.

18 THE COURT: Okay.

19 MR. HURST: We have also entered into a series of
20 tolling agreements, but primarily with professional service
21 providers to try to resolve those without the need for filing
22 the complaint. And as I said, we didn't file complaints for
23 anyone under 20,000. To the extent we were unable to resolve
24 those through the demand letter process, we let those claims
25 go, just didn't make sense economically.

1 And our plan is to try to resolve as many of these as
2 possible without resort to the Court. You've seen the
3 procedures and we're going to explain them, but we're going to
4 focus in particular on the smaller claims to try to knock them
5 out even before we get to a mediation process. And that was
6 the background I had planned to give Your Honor. I think
7 unless you have questions for me, I'll turn it over to Mr.
8 Geoghan to walk you through --

9 THE COURT: No, I've read the order but -- okay.

10 MR. HURST: Okay. Thank you, Your Honor.

11 MR. GEOGHAN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. GEOGHAN: Dan Geoghan from Cole Schotz here on
14 behalf of the trust to present Your Honor on the trust's motion
15 to establish procedures governing the adversary proceeding.
16 Your Honor, that's docket number 4741.

17 I'll start with the good news of the eleven objections
18 that were filed. The vast majority of them are now resolved,
19 eight of them are resolved. The three that remain are largely
20 resolved. We just have one or two small open issues that we'll
21 address as we go.

22 Your Honor, the procedures themselves that we are --

23 THE COURT: Can I ask when you served this? Because
24 people didn't know that they were going to be defendants when
25 it was first served, right?

1 MR. GEOGHAN: Correct, Your Honor. A number of people
2 did not -- well, we served at a time when only demand letters
3 were on file and the complaints hadn't been filed yet. It was
4 just a matter of a time crunch and there are certain parties,
5 as Mr. Hurst pointed out, and we were going to get to this
6 towards the end -- there are certain parties who will need to
7 be re-served because they were not subject to the demand
8 letter. They were discovered late in the process and we plan
9 to send a copy of the motion.

10 THE COURT: All I'm saying -- I'm saying you said you
11 got fourteen objections, but you served this before you really
12 brought any actions. Now that people know they're defendants
13 and if you sent this to them, you might get more objections.

14 MR. GEOGHAN: Well, that is possible, Your Honor.
15 That is possible to get more objections, but if I may, the
16 objections we did receive focused on a certain few issues,
17 which once we discussed it with the objecting parties, it
18 became clear that their objections -- that their issues could
19 be worked through very easily in the process.

20 THE COURT: Okay.

21 MR. GEOGHAN: The process was loose enough. The only
22 really big remaining issue that was out there, which we'll get
23 to, is the issue of filing dispositive motions before a
24 mediation process.

25 THE COURT: Um-hum.

1 MR. GEOGHAN: So, if I may, the procedure itself is
2 based on the procedure that Judge Glenn has employed in a
3 number of cases recently. He used it in the Borders case, LHI
4 Liquidating, which was the Leohmann's II case and the Dewey
5 case, Your Honor.

6 The biggest change -- two areas of change that we made
7 from Judge Glenn's original procedures to these, the first is
8 we tightened up some of the protections for the mediator,
9 meaning that the mediator can't be called as a witness. The
10 mediators --

11 THE COURT: But it provides that he can be called as a
12 witness.

13 MR. GEOGHAN: It cannot.

14 THE COURT: If there's a dispute -- in other words,
15 the mediator tells the Court presumably that one of the
16 parties, maybe the defendant, is not cooperating or hasn't
17 shown up or hasn't satisfied the deadlines, doesn't that make
18 the mediator a witness?

19 MR. GEOGHAN: Yes, Your Honor, in that regard it can.
20 What I meant is that he can't be called to testify --

21 THE COURT: Yeah.

22 MR. GEOGHAN: -- as to the communications of the
23 parties.

24 THE COURT: Isn't that already covered by our
25 mediation order?

1 MR. GEOGHAN: I --

2 THE COURT: In other words, what's the difference
3 between what the mediator is getting in the form of protection
4 under your proposed settlement agree -- under your proposed
5 agreement and what he or she would get under our guidelines?

6 MR. GEOGHAN: Well, there's some differences in the
7 procedure of how this operates, but as to the protections
8 themselves, the protections in the existing order are certainly
9 comparable to these. These were more put in place to give
10 comfort to the mediators to know that there was a stated
11 process.

12 And, in fact, Your Honor, as Your Honor knows, these
13 types of procedures are used in most high volume avoidance
14 action processes today. I, myself, have been involved in five
15 or six of these post-confirmation trusts where we employ these
16 procedures or similar procedures. They're intended to
17 facilitate a fair and efficient process, to resolve the
18 adversary proceedings, hopefully minimizing litigation, and in
19 the most cost efficient and effective manner we can.

20 Your Honor, the procedures themselves fall into three
21 broad categories in the sense that -- or three goals really, a
22 better way to put it. In the first instance, we seek to extend
23 the early deadlines that come up in litigation; extend time to
24 answer, extend --

25 THE COURT: Nobody's going to object to that.

1 MR. GEOGHAN: Of course, Your Honor. So the first
2 instance is to give the parties some time to try and exchange
3 positions and to work things out. The second step or the
4 second part of the process is to stay formal discovery and
5 formal litigation in favor of informal discovery and the
6 mediation process. Again, the idea being to provide the
7 parties the opportunity to resolve differences, flesh out
8 defenses, flesh out places where the debtors' records were
9 incomplete, and therefore our claim or cause of action fails
10 because we didn't know something, and we want the opportunity
11 to address that.

12 In that regard, Your Honor, one of the objecting
13 parties objected, presented us -- said we have a complete
14 defense. That case is now already dismissed. So we're aware
15 that there are infirmities in the information we have, and this
16 process is intended to allow the parties to work through that
17 without spending more time than the parties need to in
18 litigation and in costs.

19 Your Honor, the third and final part of that process,
20 obviously, is the mediation itself and attempt to give the
21 parties a forum if they're unable to resolve their differences
22 on their own, a forum in which there is a third party who might
23 be able to facilitate that process.

24 In other cases I've dealt with, for instance, the
25 Collins & Aikman cases that I did when I was with a prior law

1 firm, we went into mediation with 1,000 cases. We came out of
2 mediation with thirty cases -- twenty-five cases. And that
3 process took us eighteen months, but we got through it and were
4 able to resolve them. And it is the stated intent of the
5 trust, the SunEdison Litigation Trust, to work with the parties
6 to seek to resolve these cases in the most efficient manner
7 possible and without the need for litigation, if it's at all
8 possible.

9 Your Honor, as Your Honor knows, pursuant to
10 Bankruptcy Rule 7016, Bankruptcy Section 105, and the inherent
11 powers of this Court, this Court has the right and the ability
12 to control its docket and to control the process and flow of
13 the litigation in front of it.

14 That being said, the recurring objection we did
15 receive -- I ran through most of them -- was the issue related
16 to the dispositive motion, whether or not parties should be
17 able to file a dispositive motion at the outset.

18 I will address that in a minute or two, but I need to
19 get through a few of the objections that we have resolved
20 first, if I may. But I wanted to put this out there, which is
21 as I've now explained and one of the reasons a lot of these
22 objections were withdrawn, as we've now explained to the
23 parties, these procedures are not designed to take away a
24 party's right to file a dispositive motion. They're designed
25 to delay when that process happens, when that motion gets

1 filed. Rather than say in May or June, a string of motions to
2 dismiss, a la the issues that arise in Delphi case, which I was
3 also involved in those actions, when a hundred motions to
4 dismiss were filed in the opening month, and that's not
5 necessarily conducive to any process.

6 What the hope would be here is that we give the
7 parties some time --

8 THE COURT: You know in Madoff, if somebody filed a
9 motion to dismiss for failure to state a claim, that went to
10 mediation.

11 MR. GEOGHAN: I'm not aware of what the procedure was
12 in Madoff. However, in here -- and so I'll jump right to it
13 now and then we can come back to how we resolved the other
14 objections. Your Honor, the way the procedures are proposed,
15 we have -- the parties can extend deadlines -- the answer or
16 the response -- I don't want to say answer, the response
17 deadlines, and it's specifically discussed as a response
18 deadline, not an answer deadline, for up to ninety days. And
19 at the end of those ninety days, if the parties have filed a
20 responsive pleading, if the defendant has filed a responsive
21 pleading and answer, the parties have thirty days to move it
22 into mediation.

23 However, there's also the option if a party -- if a
24 defendant prefers, to at that point not file a responsive
25 pleading, elect to go into mediation without a responsive

1 pleading filed, and they can do this at any time. They don't
2 have to wait until ninety days out, and we push the case into
3 mediation. The case can be mediated and the responsive
4 pleading isn't due until thirty days after the mediator's
5 report is filed.

6 THE COURT: I understand.

7 MR. GEOGHAN: Thus, preserving any party's right to
8 file a dispositive motion, whether it be a motion to dismiss or
9 a summary judgment motion.

10 THE COURT: What do you say to the defendant who says
11 you have no personal jurisdiction over me? How can I force
12 someone like that into mediation if I don't have jurisdiction
13 over them?

14 MR. GEOGHAN: We have hit one of those already on a
15 relation of extraterritoriality in connection with one of these
16 objections. We exchanged -- they provided us their
17 information. We provided them why we thought we had
18 jurisdiction over them. We discussed the case law. The case
19 is now resolved.

20 THE COURT: Okay. But there's nothing in any of this
21 that prevents you from resolving cases informally. The
22 question I have is can I compel someone to submit to mediation
23 without letting them make a motion, for instance, saying you
24 never served me with process or you lack personal jurisdiction
25 over me. How do I do that?

1 MR. GEOGHAN: Well, Your Honor, we understand that
2 there's a challenge there to the extent we're addressing
3 gatekeeping issues --

4 THE COURT: Yeah.

5 MR. GEOGHAN: -- issues of jurisdiction and things of
6 that nature. We believe in good faith that we'll be able to
7 resolve those.

8 THE COURT: I understand that.

9 MR. GEOGHAN: However, that being said --

10 THE COURT: But they have the right to test it.

11 MR. GEOGHAN: -- if the Court needs us to modify the
12 procedures to allow those --

13 THE COURT: I'm just asking --

14 MR. GEOGHAN: -- I hate to split hairs on it.

15 THE COURT: -- I asked you --

16 MR. GEOGHAN: I know.

17 THE COURT: So do I, look at me.

18 MR. GEOGHAN: Exactly.

19 THE COURT: But what I am asking you is a legal
20 question. Can I compel someone over whom I lack personal
21 jurisdiction to submit to mediation? That's a legal question.

22 MR. GEOGHAN: It's a tough question. I --

23 THE COURT: Other than possibly in the context of that
24 particular motion.

25 MR. GEOGHAN: Without having researched the issue,

1 Your Honor, I would argue yes, that under the inherent powers
2 of this Court, the Court can seek to resolve matters, even if
3 this were a jurisdictional matter presented before the Court,
4 the Court could say there is a challenge here that I'm
5 uncertain of and I want the party to go speak to someone.

6 I mean, is there a reason the Court can't ask the
7 parties to have a third-party mediator? I believe under the --

8 THE COURT: I'm directing mediation here. I'm not
9 asking parties to mediate.

10 MR. GEOGHAN: True. We're directing mediation here.
11 We are directing mediation here.

12 THE COURT: Okay.

13 MR. GEOGHAN: I understand that challenge. I
14 understand there's a challenge there. We recognize it and we
15 recognize that there's a possibility, in that context, we might
16 have to address motions to dismiss if matters can't be
17 resolved. And maybe there is a context there in which --

18 THE COURT: Maybe just a pre-motion conference.

19 MR. GEOGHAN: Maybe there's a context -- you're right,
20 Your Honor, and there are, as Your Honor is, I'm sure, aware --
21 there are procedures out there that have a different address
22 for motions to dismiss, which is any party seeking to file a
23 motion to dismiss must have a pre-motion conference before that
24 motion is filed. I've been in those cases. We got a lot of
25 motions to dismiss in that case.

1 To the extent that we are talking about a
2 jurisdictional or a gatekeeping issue, understood. To the
3 extent we're talking about failure to state a claim for which
4 relief can be granted -- someone who looks at it and says I see
5 a preference and a fraudulent conveyance, only one of them can
6 be true. It's either an antecedent debtor or it isn't.

7 So instead of coming to us and having a conversation,
8 someone throws a motion up on the docket and says we're just
9 going to fight it instead. That takes the teeth out of having
10 some kind of process that allows to resolve those issues. And
11 I think as we have shown in good faith, eleven objections,
12 we've resolved almost everything inside of a week. We're in
13 a -- it's not in our best interest as the purveyors of some 500
14 litigations, some of which are very large, to be in a position
15 where we're defending -- where we're not cooperating and being
16 part of the process. If we're going to go into it as a stick
17 in the mud and try and be difficult for people to deal with,
18 we're not going to get settlements. We're going to wind up
19 with litigation, 480 of them, and that won't be much fun for
20 anybody.

21 So Your Honor, turning to the objections for -- the
22 other objections, as I said I would, Your Honor, there were
23 eleven objections filed. Three of them remain open in some
24 part. Most of them are largely resolved. The objections filed
25 by Kingsbridge Holdings, which was adversary proceeding number

1 18-01075, that was at docket entry number 5246 -- that has been
2 settled and withdrawn.

3 THE COURT: Why don't you tell me the categories of
4 objections because when you tell me the names --

5 MR. GEOGHAN: Sure.

6 THE COURT: -- of the objectors or the docket entries,
7 I don't really focus on that.

8 MR. GEOGHAN: Well, they --

9 THE COURT: What was their objection, and how has it
10 been resolved?

11 MR. GEOGHAN: It was --

12 THE COURT: Or how has it --

13 MR. GEOGHAN: -- so their objection was a
14 gatekeeping -- they had gatekeeping objections.

15 THE COURT: Okay.

16 MR. GEOGHAN: So let's start with ESM Powers, an
17 easier one. ESM had an extraterritoriality argument.

18 THE COURT: Okay.

19 MR. GEOGHAN: There was discussion back and forth.
20 We're aware of the Court's case. We're aware of the authority
21 from Judge Gerber and --

22 THE COURT: That issue is in the Court of Appeals now.

23 MR. GEOGHAN: Excuse me?

24 THE COURT: The issue is in the Court of Appeals.

25 MR. GEOGHAN: I was not aware of that, but we raised

1 it. We discussed it. We both expressed our -- the facts that
2 suggest whether or not we thought there was no
3 extraterritoriality issue. The parties agreed to resolve it.
4 There were others. In the end, we looked at the
5 extraterritoriality issue. We looked at the defenses, and it
6 got resolved.

7 THE COURT: But what was the objection?

8 MR. GEOGHAN: The objection in that case was we should
9 be allowed to file a motion to dismiss based on
10 extraterritoriality.

11 THE COURT: Okay. So you resolved that particular
12 objection.

13 MR. GEOGHAN: Yes.

14 THE COURT: Next?

15 MR. GEOGHAN: The Kingsbridge Holdings was -- the
16 objection was also, they wanted to file -- wanted to be in a
17 position to file a motion to dismiss. They came to us with a
18 position statement. We evaluated it. We agreed to a
19 settlement.

20 THE COURT: Okay. So you resolved that specific
21 objection.

22 MR. GEOGHAN: We resolved that specific objection. We
23 didn't make changes to resolve it. There was only one
24 objection we made changes to resolve.

25 THE COURT: Is there anything you changed in the order

1 as a result of the resolution of an objection?

2 MR. GEOGHAN: Yes, there is, Your Honor.

3 THE COURT: What is that?

4 MR. GEOGHAN: And we have a --

5 THE COURT: One that would apply across the board.

6 MR. GEOGHAN: Excuse me?

7 THE COURT: One that would apply across the board.

8 MR. GEOGHAN: Yes. And we have a blackline. They're
9 very limited.

10 May I approach?

11 THE COURT: Yes.

12 MR. GEOGHAN: Your Honor, they're in Section B.

13 THE COURT: Oh, I see. You added no later than ten
14 days in a couple of places.

15 MR. GEOGHAN: So there was an objection raised that
16 the order suggested -- the procedure suggested that the --
17 excuse me -- that the conferences that would have to happen
18 subsequent to a mediation report being filed would happen upon
19 the mediation report. The word was "upon" the mediation report
20 being filed. They asked for clarification that it would be ten
21 days after we entered it. We gave them that.

22 And the other was on page 3, this is paragraph G(4),
23 an issue was raised whether or not the mediator could command
24 discovery, require discovery, and we agreed it was not the
25 intent of the procedures to put the mediator in a position

1 where the mediator could compel discovery from parties, and
2 instead changed the language to "request". The mediator could
3 request documents from parties.

4 THE COURT: Can't a mediator always do that?

5 MR. GEOGHAN: Yes.

6 THE COURT: All right.

7 Let me hear from the objectors. I have my own
8 comments on this, but let me hear from them.

9 MR. GEOGHAN: I am sure. I would just -- one thing.
10 I think a number of the objectors are not here. As I said,
11 they were resolved. We did agree to -- with some of those
12 parties, to make certain statements on the record --

13 THE COURT: Okay.

14 MR. GEOGHAN: -- to resolve their objections. I can
15 address that after we hear from those in the courtroom.

16 THE COURT: Yeah, let me -- because there may be other
17 issues with the order.

18 MR. GEOGHAN: Okay.

19 THE COURT: So let me hear from the parties who still
20 are objecting to this.

21 MR. GEOGHAN: Thank you, Your Honor.

22 MR. JAFFE: Good morning, Your Honor. May it please
23 the Court. Your Honor, my name's Henry Jaffe. I'm an attorney
24 from Pepper Hamilton, and I am here for defendant objector
25 Eldor Construction Corp. (sic).

1 Your Honor heard the presentation of counsel and a
2 couple of notes. Number one, we filed an objection raising
3 concerns with a number of aspects of the procedures order. Two
4 of the changes that were made were made in response to
5 objections that we raised, but in our view, this doesn't go far
6 enough.

7 Your Honor, our primary objection, as counsel alluded
8 to, is we are extremely concerned and very much object to the
9 process that would prevent my client from filing a motion to
10 dismiss in lieu of an answer prior to mediation. I want to
11 emphasize, Your Honor, we generally -- other than some very
12 finite and specific issues, but this issue most importantly,
13 we're fine with going to mediation. We expect to go to
14 mediation if we can't resolve our matters consensually before
15 that time.

16 Well, we agree that the mediation procedures, which
17 really if you think about it are a bully pulpit, right? They
18 sue a bunch of defendants. They get you rounded up. You go to
19 mediation. There's a lot of power associated with that.

20 What we're asking you to do is, at the very least,
21 have the rights that were otherwise afforded under the
22 Bankruptcy Rules and Federals and that includes the right,
23 without having some type of stay that's imposed -- by the way,
24 is not contemplated by the Rules -- to go ahead and file a
25 motion to dismiss.

1 And I want to emphasize that this is of great
2 importance here because -- and I realize, Your Honor, this is
3 not the time or the day to get into the merits on our adversary
4 proceeding. That would be totally inappropriate. But by way
5 of context, I've got a client that's had an assumed executory
6 contract. My client received millions of --

7 THE COURT: Your client has an assumed executory --

8 MR. JAFFE: Absolutely.

9 THE COURT: Well, that's an absolute defense to a
10 preference claim.

11 MR. JAFFE: And, Your Honor, hence the reason --

12 THE COURT: Right.

13 MR. JAFFE: -- why we want to be able to file a motion
14 to dismiss. We don't believe under any set of circumstances
15 that they can, nor have they, articulated a claim for relief.

16 What they've asked for is not contemplated by the
17 Rules. We have a choice. We have a choice to file a motion to
18 dismiss or choice to file an answer. We choose to file a
19 motion to dismiss, number one.

20 Number two, with respect to the process, not only -- I
21 think their concern was well, we want to be efficient, we want
22 these to be focused. To me, there's no better way to focus a
23 mediation than have the party tell you, here's why my complaint
24 should be dismissed. That's a gating issue. That's something
25 that needs to be addressed by the parties. That's the first

1 thing that they should be talking about in mediation. So
2 rather than impairing or somehow interfering with the mediation
3 process, to me that furthers the mediation process.

4 My third point, Your Honor, is that this idea of well,
5 you know, mediation and motions to dismiss, it's a madhouse,
6 nobody -- I want to be really clear, we don't expect a parallel
7 track. We file our motion to dismiss. We are perfectly
8 content, at that point, to have the matter go to mediation. If
9 the plaintiff wants to file a response, that's up to them. We
10 don't wish to stay them, but we certainly don't expect that
11 they're going to have an obligation to file a responsive
12 record, nor do we expect that motion to dismiss to be
13 adjudicated.

14 THE COURT: So you just want to file the motion as
15 your bargaining chip or whatever or your issue in mediation.

16 MR. JAFFE: And that's exactly right. It's going to
17 be the first thing the parties can and should talk about at the
18 mediation.

19 THE COURT: Okay.

20 MR. JAFFE: Of course, we can discuss all kinds of
21 other issues.

22 THE COURT: So you're essentially saying that the
23 motions themselves should be mediated.

24 MR. JAFFE: Exactly.

25 THE COURT: All right.

1 MR. JAFFE: And finally, Your Honor, my concern about
2 this is everybody -- first of all, like I said with the bully
3 pulpit, these folks have been researching these issues for
4 years. They were employed a long time ago. An issue that
5 might be a 10,000 or 100,000 dollar issue to one defendant,
6 could very well be an issue that's a multimillion dollar issue
7 to the plaintiffs because they have it across a number of
8 cases. They have economies of scale on their side.

9 We don't have as many rights as the defendant -- as
10 the plaintiffs do. As a defendant, one of those important --

11 THE COURT: Well, that's the nature of --

12 MR. JAFFE: -- rights is the right to file a motion to
13 dismiss.

14 THE COURT: -- that's the nature though of being a
15 plaintiff in 470 actions.

16 MR. JAFFE: That's absolutely right, but to deprive us
17 of the right to go and file those motions to dismiss, certainly
18 gives them a leg up that the Rules don't --

19 THE COURT: So you're proposing that the motion gets
20 filed but their obligation to respond is stayed pending
21 mediation?

22 MR. JAFFE: Absolutely, stayed or permissive. In
23 other words, they're not required to but they're -- if they'd
24 like to, we have no problem with that, but the goal is not to
25 require them to do more work. The goal is to articulate our

1 issue and allow that to be resolved in the context of the
2 mediation.

3 THE COURT: All right.

4 MR. JAFFE: A couple of other points, and I think
5 they're really secondary compared to that main point, the
6 plaintiff suggests that parties will have the option of filing
7 a motion to dismiss later. They have the ability to do that.
8 That's actually not the way the procedures are articulated.
9 The way the procedures are articulated would effectively give
10 the plaintiff, if they wanted to, a blocking right with respect
11 to the right to file a motion to dismiss, and I'll explain what
12 I mean by that.

13 First, they ask for a stay of the right to file
14 motions to dismiss through some period of time after the
15 mediation is concluded, after the mediator's report is filed.
16 At stay, you can't find the motion to dismiss. Again, we argue
17 that that's inappropriate, and if, in fact, Your Honor agrees
18 with that, I think my secondary point here becomes moot.

19 If you combine, however, that proposed procedure which
20 would stay your right with the fact that defendants don't have
21 a unilateral right to extend their response date, they need
22 permission under their procedures --

23 THE COURT: I'm sorry. Their response date --

24 MR. JAFFE: So the response date is to -- so the way
25 it would work under their procedures is twofold: one, the

1 right to file motions for dispositive relief would be stayed
2 until after the mediation, okay?

3 The second part is well, okay, so what are you going
4 to do? Well, what's going to happen? They suggested that
5 defendants can simply elect to delay their response until after
6 the mediation is over, but that's not how it's articulated.
7 Under their procedures, which are procedures (a)(1) and (a)(2),
8 the defendant needs the consent of the plaintiff to extend the
9 response date. If they don't give that consent, then you're
10 not going to be able to file a motion to dismiss because it's
11 stayed. You'd have to file an answer.

12 So that may not have been what they originally
13 intended --

14 THE COURT: Well, normally the plaintiff does have to
15 consent to an extension beyond -- I guess this is beyond the
16 ninety days, they're talking about?

17 MR. JAFFE: Yeah.

18 THE COURT: Why would the plaintiff have to consent to
19 that?

20 MR. JAFFE: They don't, Your Honor, but my point is if
21 they don't consent and you're stayed from filing a motion to
22 dismiss, and you have to respond, you'd have no choice but to
23 file an answer.

24 THE COURT: Oh, all right.

25 MR. JAFFE: And that's -- obviously, if my first point

1 is taken by the Court and a modification is made such that
2 parties have the right to file a motion to dismiss and move and
3 answer, the second point becomes moot.

4 THE COURT: Okay.

5 MR. JAFFE: My other two points are very minor, Your
6 Honor, and I don't want them to overshadow our primary point.
7 Another point that we have, Your Honor, is the way this
8 procedure is set up, the plaintiff, by basically notating on a
9 complaint, has the ability to choose who is going to be in and
10 out of the mediation.

11 THE COURT: Yeah, that I didn't understand.

12 MR. JAFFE: Yeah, I don't think that's appropriate.

13 And then our last point is, and I am going to be very
14 brief about it, is just how the allocation of costs of the
15 mediation should be. Our view is you've hauled us in here, I
16 think in many cases, under theories that are really doubtful,
17 at best. It should be the plaintiff who absorbs the cost.
18 Some courts order that. Other courts are -- whatever happens,
19 Your Honor, we will participate in this process and we just ask
20 Your Honor to reach a resolution that's just.

21 THE COURT: Thank you.

22 MR. JAFFE: Thank you.

23 MR. MARX: Good morning, Your Honor. Brendan Marx,
24 Offit Kurman. We represent --

25 THE COURT: Would you keep your voice up, please?

1 MR. MARX: Pro-Tech Energy Solutions. Our client was
2 the recipient of one of those 650 demand letters, and the
3 demand letter that our client received was for some 7,000
4 dollars in alleged preferential payments.

5 THE COURT: Were you sued?

6 MR. MARX: We've received the complaint about a week
7 ago. It has not yet been served. The complaint, completely
8 out of the blue, alleges some 3.7 million dollars in fraudulent
9 transfers. There are zero factual allegations back in the
10 alleged lack of reasonably equivalent value.

11 We second the statements just made by counsel who just
12 spoke. We need to reserve the right of due process to file a
13 motion to dismiss and have that resolved before our client
14 incurs the very substantial cost of the mediation.

15 THE COURT: Well, if you're being sued for 3.7 million
16 dollars, the cost is not that substantial in the order.

17 MR. MARX: Well, our client is not of the same scale
18 of SunEdison. It's a modestly-sized company and the cost of
19 mediation is very substantial to it.

20 THE COURT: Let me ask you a question. I had asked
21 Mr. Jaffe the question, do you have an objection to being able
22 to file the motion, stay the plaintiff's time to respond to it,
23 and then go to mediation with the motion pending? It may cost
24 you more to come here and litigate the motion is what I am
25 saying, once you file it because they're going to file a

1 response and then you're going to file a reply and then you're
2 going to have to come here to argue it.

3 MR. MARX: I think we would have no objection to that
4 approach.

5 THE COURT: Okay.

6 MR. MARX: I have nothing further.

7 THE COURT: Okay, thank you.

8 MR. MARX: Thank you.

9 THE COURT: Anybody else? All right. Let me --

10 MR. GEOGHAN: May I, Your Honor?

11 THE COURT: Sure. Then I'll tell you the problems I
12 have with your procedures.

13 MR. GEOGHAN: Excuse me, Your Honor?

14 THE COURT: Go ahead and then I will tell you the
15 problems I have with your procedures.

16 MR. GEOGHAN: Thank you, Your Honor. Your Honor, the
17 only response I had to the arguments that were being made is --
18 and to the concept of filing a mediation -- excuse me, a motion
19 to dismiss that's stayed and sits and is stayed until the
20 mediation is processed through, that would be okay. I am not
21 sure if I see a substantive difference between that and putting
22 those same arguments into a mediation statement --

23 THE COURT: No.

24 MR. GEOGHAN: -- which would then be thirty days
25 later.

1 THE COURT: But it's no cost -- it's really no cost to
2 you if somebody wants to file a motion, right?

3 MR. GEOGHAN: It isn't, but --

4 THE COURT: As long as the time is stayed --

5 MR. GEOGHAN: That is correct, Your Honor.

6 THE COURT: -- you know where they're coming from
7 going into the mediation.

8 MR. GEOGHAN: Excuse me?

9 THE COURT: You know where they're coming from.

10 MR. GEOGHAN: Oh, absolutely but I also believe that
11 if they filed the -- I also believed if they filed the
12 mediation statement, presumably they would make those same
13 arguments in the mediation statement, and what is the
14 substantive difference between filing a motion to dismiss that
15 is stayed and sits there and then gets turned into a mediation
16 statement and filed in a mediation --

17 THE COURT: You've just made his argument.

18 MR. GEOGHAN: Okay.

19 THE COURT: There's no substantive difference and he
20 wants to file a motion.

21 MR. GEOGHAN: And --

22 THE COURT: And it doesn't cost you anything.

23 MR. GEOGHAN: I agree, Your Honor.

24 THE COURT: Okay.

25 MR. GEOGHAN: It doesn't cost us anything --

1 THE COURT: Okay.

2 MR. GEOGHAN: -- and there's no substantive
3 difference.

4 THE COURT: Let me just go through some of these
5 things.

6 MR. GEOGHAN: Okay.

7 THE COURT: This was raised by Mr. Marx, I think.

8 MR. MARX: Yes, Your Honor.

9 THE COURT: I hope I got your name right.

10 MR. MARX: Yes.

11 THE COURT: Both the order and the procedures give the
12 plaintiff the ability to decide which adversary proceedings are
13 part of this procedure and which ones are not.

14 MR. GEOGHAN: They're all part of the procedure, Your
15 Honor.

16 THE COURT: So that should come out.

17 MR. GEOGHAN: It can come out. They're all -- the
18 only -- there were two that weren't -- I shouldn't say that.
19 There are two very large, one-off adversary proceedings, not in
20 a high volume, one against General Electric, one against D.E.
21 Shaw, that are not part of this procedure.

22 THE COURT: Take it out.

23 MR. GEOGHAN: But all the volume ones are in.

24 THE COURT: Take them out.

25 MR. GEOGHAN: You got it.

1 THE COURT: With respect to the dispositive motions, I
2 think we've resolved it, but anybody can file a dispositive
3 motion. Your time will be stayed and key your response to some
4 period, whether it's fourteen days, whatever after the
5 termination of the mediation.

6 Now, with respect to the mediators themselves, you
7 have listed a group of people and this appears to be the
8 universe of people that can be mediators in a case.

9 MR. GEOGHAN: Your Honor, it will not be the universe.
10 It's not. There's actually a procedure in there that allows
11 people if they don't want to use those mediators to work with
12 us to select. And may I just say one thing about that? Again,
13 coming from the experience of having done this six or seven
14 times, there's a benefit to all parties to have a body of
15 mediators who are intimately familiar with the facts and the
16 circumstances around the case.

17 THE COURT: Why don't you just say that the plaintiffs
18 consent to the selection of any of the individuals that are on
19 this list? If a defendant does not consent, then I'll just
20 select a mediator in accordance with the -- either the parties
21 can further confer or I'll just select a mediator.

22 MR. GEOGHAN: It does.

23 THE COURT: You don't get to pick --

24 MR. GEOGHAN: It says that.

25 THE COURT: You don't get -- well, it does and it

1 doesn't. In G(2), it says, "The parties shall jointly select
2 the mediator from the list."

3 MR. GEOGHAN: Um-hum.

4 THE COURT: And then there's something later on in
5 G(2) which says, "If the parties are unable to agree on a
6 mediator," which is inconsistent with the first part. So you
7 consent to these people. If anybody -- if the defendants
8 consent, fine, just follow whatever procedures you have to
9 designate them as the mediator. Otherwise, you have a dispute
10 over who should be the mediator, and I'll select the mediator.
11 The point is you don't get to select the mediator.

12 MR. GEOGHAN: Well, that is perfectly fine. We ran
13 into a few challenges when we called mediators who wouldn't do
14 it for the fees.

15 THE COURT: I never let -- I've done these before. I
16 never let the plaintiff simply designate the mediators.

17 MR. GEOGHAN: Okay.

18 THE COURT: Okay. You have this -- I will make this
19 specific comment and then it's a general comment at the end.
20 You have a fairly, what I'll call a Draconian provision -- I'm
21 looking I guess at 9 -- where if some reason somebody has to
22 cancel the mediation, they have to do it a week before or
23 something like that. What happens if there's an emergency and
24 the person just can't show up for a valid reason? Their kid is
25 sick. Their spouse is sick.

1 MR. GEOGHAN: This is which section, Your Honor? I
2 think I know what you're talking about, but I just want to make
3 sure I'm looking --

4 THE COURT: I'm looking at --

5 MR. GEOGHAN: -- at the right language.

6 THE COURT: Where is it? It's the one where if you
7 cancel or you fail to appear -- it's number 15 -- you have to
8 give a notice in a week in advance.

9 MR. GEOGHAN: Your Honor, yes, it is in there. We can
10 make changes.

11 THE COURT: Let me make a more general comment.

12 MR. GEOGHAN: Okay.

13 THE COURT: There's nothing in your proposed
14 procedures which say that for cause shown, the Court can
15 relieve anybody from anything in this. I mean, all sorts of
16 things can come up, right?

17 MR. GEOGHAN: Understood, Your Honor, and we can work
18 with that. The intent was not to be Draconian. The intent was
19 to protect --

20 THE COURT: I understand.

21 MR. GEOGHAN: -- and based on experience, the
22 mediators and their fees.

23 THE COURT: I don't have a problem with the notion
24 that if somebody knows a week before that they can't show up,
25 they have a conflict, whatever it is, that as a matter of

1 common courtesy, they should let everybody know, but you have
2 to account for the fact that sometimes people just can't show
3 up.

4 MR. GEOGHAN: For cause shown. Understood.

5 THE COURT: It happens here too.

6 MR. GEOGHAN: Of course.

7 THE COURT: With respect to the fees, I don't see why
8 somebody who's being sued for 20,000 dollars has to pay 2,500
9 dollars to a mediator plus costs. Let's just say that the
10 plaintiff pays all the fees for any demand that's less than
11 100,000 dollars, okay?

12 Now, there's a thing in here also about expenses.
13 That's in addition to the fee, the mediator expenses?

14 MR. GEOGHAN: To the extent any might be incurred.
15 There's an option for the parties if they so choose -- for
16 instance, some of the objecting parties intend to choose this,
17 they don't want to mediate here. They want us to mediate
18 somewhere else.

19 THE COURT: That I understand but -- and that's an
20 additional 750 dollars a day, plus if he's got to get on a
21 plane, I assume.

22 MR. GEOGHAN: Plus if he's got to get on a plane, his
23 expenses, Your Honor.

24 THE COURT: Yeah, okay. But then you say the parties
25 shall each pay half of the -- I'm looking at 6(d) and they have

1 to pay half within fourteen days after the billing by the
2 mediator, plus his reasonable and actual expenses. That seemed
3 open-ended to me. I understand situations where -- I
4 understand the 750 dollars because you have that in here.

5 MR. GEOGHAN: Um-hum.

6 THE COURT: And if somebody wants to go mediate in
7 Chicago, that they should have to pay the mediator --

8 MR. GEOGHAN: Yes.

9 THE COURT: -- or will likely select a mediator who
10 lives in Chicago. But what are the other reasonable fees and
11 expenses? What kind of expenses are we talking about? Is
12 there a cap on it?

13 MR. GEOGHAN: There's no cap on it, Your Honor, and
14 the reason it's delayed until fourteen days after is we
15 don't -- if someone chooses a mediator from the New York panel
16 and they're going to mediate in Chicago, then that mediator's
17 got to fly out. We don't know what those mediator's expenses
18 are until those mediator's expenses come in and are invoiced to
19 us.

20 THE COURT: All right. You have a provision here that
21 if a defendant fails to timely -- this is paragraph 16, "If a
22 defendant fails to timely pay a bill for a mediator's fees and
23 expenses, the trust may pay the bill and recover such sum as
24 part of a default judgment." What happens if you don't get a
25 default judgment, but you get a judgment on the merits after a

1 trial? You can't tax that cost.

2 MR. GEOGHAN: Well, we would want to be able to tax
3 that cost at that point.

4 THE COURT: So it's not limited to default judgments?

5 MR. GEOGHAN: No, it's not intended to be limited to
6 default judgments.

7 THE COURT: Okay. So to the extent there's an
8 implication that if you don't pay the mediator's fees or
9 expenses, you're going to suffer a default judgment, you're not
10 intending to say that, are you?

11 MR. GEOGHAN: No, to pay the mediator's fees or
12 expenses, not intended to incur a default judgment by itself.

13 THE COURT: You could always make that motion.

14 MR. GEOGHAN: Yes.

15 THE COURT: But I am just not going to enter a default
16 judgment on a certification that the expenses have been paid.

17 In provision (I) you have a motions affecting
18 avoidance actions.

19 MR. GEOGHAN: Which provision was that, Your Honor?

20 THE COURT: (I), the last one.

21 MR. GEOGHAN: (I).

22 THE COURT: I'm not sure I understand, first of all,
23 how you can file a motion that affects an adversary proceeding,
24 but you don't file it in the adversary proceeding.

25 MR. GEOGHAN: I think the idea behind this provision

1 is to make sure that the trust isn't filing a motion in an
2 adversary proceeding that affects everyone and not everyone is
3 going to be completely aware of it. For instance, if we file
4 an adversary -- if we file some procedure -- if we determine
5 there's a common issue among the cases, and we determine that
6 we're going to have an insolvency proceeding, that we bind
7 everyone through the bigger case by letting people know this is
8 coming, we can also add to file it into all the adversary
9 proceedings.

10 THE COURT: Because I know what we do in Madoff is you
11 file a case-specific motion where motions that affect that
12 adversary proceeding in the adversary proceeding, but
13 everything gets filed in the case docket, not just motions.
14 Everything gets filed in the case docket.

15 MR. GEOGHAN: The main case docket.

16 THE COURT: In the main case docket. So anybody who
17 wants to look at what's going on in the other cases can see. I
18 don't think you're going to have too many cases like that. I
19 can understand where you might have an omnibus proceeding on
20 insolvency.

21 MR. GEOGHAN: Right.

22 THE COURT: That's the only one I can think of offhand
23 that you would have the case like this.

24 MR. GEOGHAN: That's the one I keep coming back to, as
25 well.

1 THE COURT: All right. Maybe fraudulent intent if you
2 have intentional fraud cases, but a lot of these seem to be
3 preference cases.

4 MR. GEOGHAN: We don't have any of those, Your Honor.
5 There's no intentional fraud cases in this bunch.

6 THE COURT: Now, you also provide that defendants
7 shall receive notice of the filing electronically. What do you
8 do in a case where you have a pro se creditor, a pro se
9 defendant who doesn't receive electronic notice or hasn't
10 consented to it?

11 MR. GEOGHAN: We're still going to serve them.

12 THE COURT: You can't serve them electronically
13 without their consent under the Rules.

14 MR. GEOGHAN: We'd have to mail it to that party.

15 THE COURT: All right. Take a look at Rule 5 of the
16 Federal Rules of Civil Procedure.

17 MR. GEOGHAN: Um-hum.

18 THE COURT: They're going to change, I'm not sure if
19 it's this December or next December, so that you'd be able to
20 serve ECF-registered users by filing it on ECF, but you can't
21 even do that now. You have to send them a separate email.

22 Do you have a website?

23 MR. GEOGHAN: The trust has a website, yes.

24 THE COURT: You should post these procedures also on
25 the website.

1 MR. GEOGHAN: We will do that, Your Honor.

2 THE COURT: And what I am going to ask you to do,
3 circulate a blackline copy or a redline copy of the procedures
4 and the order, but before I sign anything, I want you to give
5 further notice because these were all served before the -- or
6 most of them were served before the adversary proceedings were
7 started. So what I am going to ask you to do is let's finalize
8 the order. I'll have you send it out a notice of presentment
9 or something like that, to all the defendants in all the
10 actions --

11 MR. GEOGHAN: Okay.

12 THE COURT: -- so that if there's anybody else who has
13 a problem with it, they'll have an opportunity to come in.

14 MR. GEOGHAN: Okay. And we could put that on for
15 presentment, I think the next omnibus is the 15th of March --
16 sorry, 15th of May, I think.

17 THE COURT: Well, it's the end of April already. Why
18 don't we -- let me sign the order or send me the order -- yeah,
19 you can put it out for notice. That's fine.

20 MR. GEOGHAN: Okay.

21 THE COURT: That's a better idea. Put it out the
22 15th.

23 MR. GEOGHAN: Put it on for notice for the 15th and --

24 THE COURT: Notice the proposed order for the 15th on
25 all the defendants and all the actions.

1 MR. GEOGHAN: Right. And that way, there'll be an
2 opportunity for people to come back.

3 THE COURT: Right. Okay. Anything else on this?

4 MR. GEOGHAN: Your Honor, I just wanted to make a
5 couple of -- I want to relate in response to some of the
6 objections, there's a couple of points people asked me to put
7 on the record, and if I may just take a moment to do that, Your
8 Honor.

9 THE COURT: Go ahead, sure.

10 MR. GEOGHAN: First is the SunEdison Litigation Trust,
11 that the SunEdison Litigation Trust will mediate the adversary
12 proceedings against the California Department of General
13 Services. So that was the two prisons. Those were withdrawn
14 and there's a much bigger action now.

15 Burgelectric and MbarC Construction in California, if
16 that's where they would like to do it. We also agree to work
17 with those defendants to choose California-based mediators, if
18 that's what they would like to do. We note for the record,
19 there are several California-based mediators on the New York
20 Register of Mediators. And if the parties are unable to choose
21 a California mediator, we'll come back to the Court and seek
22 the Court's assistance.

23 THE COURT: Okay.

24 MR. GEOGHAN: Your Honor, in regard to Oracle, one of
25 the objecting parties which the objection was resolved, asked

1 me to make the following statement: It is the intention of the
2 SunEdison Litigation Trust to work to resolve cases without the
3 need for mediation or litigation. To that end, the procedures
4 seek authority to grant re-extensions for up to ninety days, to
5 give parties time to resolve matters where possible which
6 extensions will be granted by the trust, so long as the parties
7 are continuing to negotiate in good faith. We agree to mediate
8 the adversary proceeding against Oracle in California, New
9 York, or some other mutually agreeable location. We also agree
10 to work with Oracle to choose a California mediator or other
11 mutually agreeable mediator. If the parties are unable to
12 choose a mutually agreeable mediator, the parties will come
13 back to the Court --

14 THE COURT: Okay.

15 MR. GEOGHAN: -- and seek the Court's guidance. To
16 the extent the mediation becomes necessary, following parties'
17 good faith attempt to resolve, the parties will split the cost
18 of the mediator and mediation, including travel costs of the
19 mediator, if any are incurred, but each party will be
20 responsible for their own legal fees and costs and expenses,
21 including travel to any location for the purpose of mediation.

22 And that resolves those objections, Your Honor.

23 THE COURT: Okay. Thank you very much. Thank you.

24 (Whereupon these proceedings were concluded at 11:11 AM)

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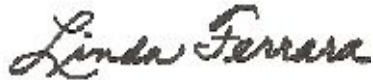
Motion granted with changes as stated
on the record, pending final review by
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C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript is a true and accurate record of the proceedings.



Linda Ferrara (CET-656)
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Date: April 27, 2018